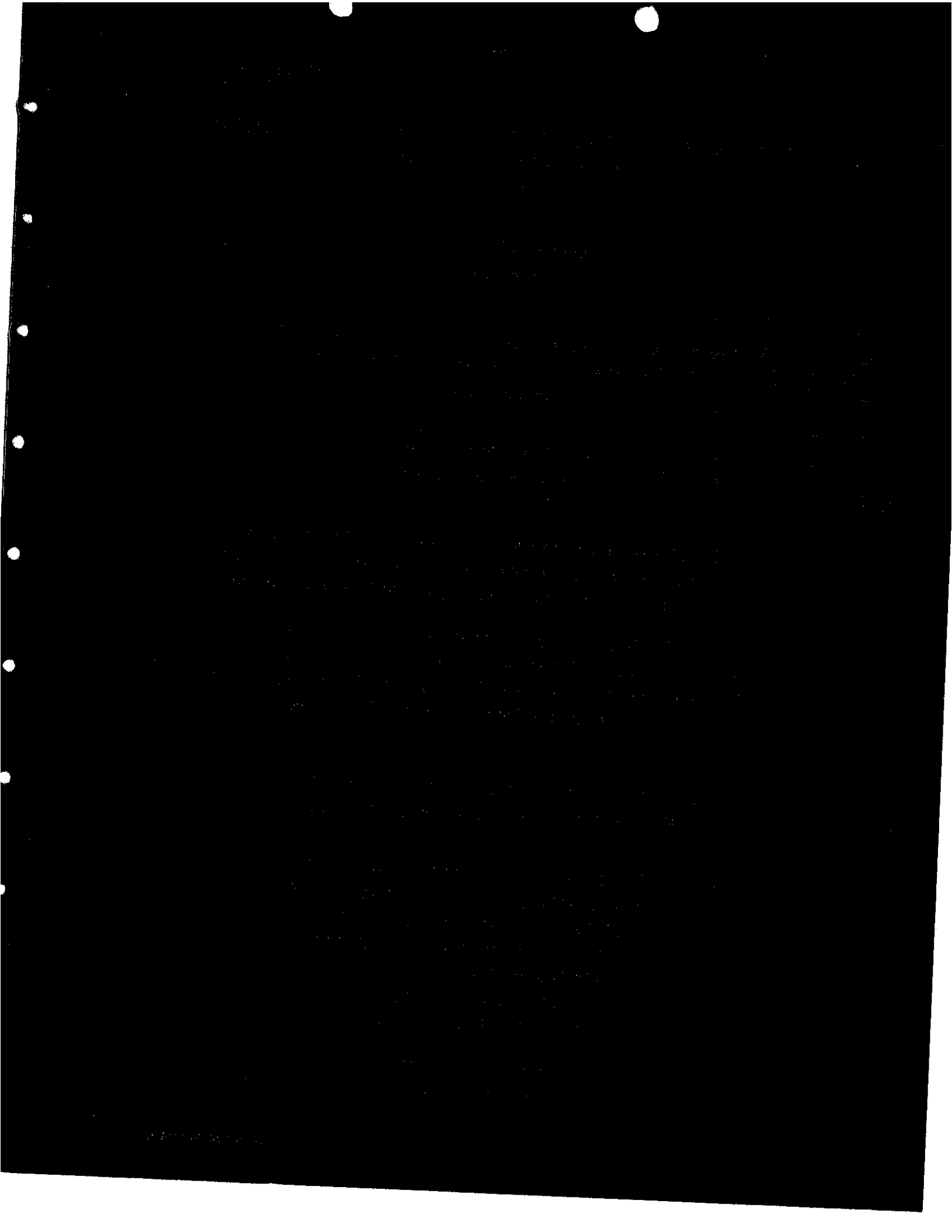

2d Civ. Case No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION __

CITY OF BURBANK,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

WILLIAM TAYLOR,
Real Party In Interest.

PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

REQUEST FOR IMMEDIATE STAY OF DISCOVERY ORDER REQUIRING DISCLOSURE OF CONFIDENTIAL PEACE OFFICER PERSONNEL RECORDS WITHOUT AN *IN CAMERA* HEARING

Los Angeles Superior Court Case No. BC 422252
Hon. John Shepard Wiley, Jr., Dept. 50, (213) 974-5673

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7123

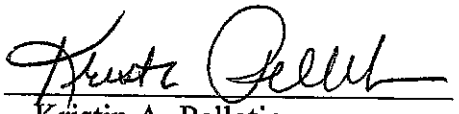
CERTIFICATE OF INTERESTED PARTIES

Due to the nature of the petition as to the privacy interests of a series of internal, police personnel investigations protected by confidentiality rights under *Penal Code* § 832.7 and 832.8 and *Evidence Code* § 1043-1047, there are several dozen individual current and former officers of the Burbank Police Department who could be said to have an "other interest" in the outcome of this petition through their confidentiality rights in their personnel documents. [Cal.Rules of Court, Rule 8.208(e)(2).] Petitioner will file an application to file a more detailed Certificate of Interested Parties under seal, if requested by the Court. [Cal.Rules of Court, Rule 8.208(d)(2).]

There are no other interested entities or persons to list in this certificate. [Cal.Rules of Court, Rule 8.208(e)(3).]

Dated: July 23, 2010

Burke, Williams, & Sorensen, LLP

By: 

Kristin A. Pelletier
Attorneys for Petitioner City of Burbank

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION __

CITY OF BURBANK,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
Respondent.

WILLIAM TAYLOR,
Real Party In Interest.

PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

STAY REQUESTED OF DISCOVERY ORDER REQUIRING THE AUGUST 11, 2010 DISCLOSURE OF CONFIDENTIAL PEACE OFFICER PERSONNEL RECORDS WITHOUT AN *IN CAMERA* HEARING

Los Angeles Superior Court Case No. BC 422252
Hon. John Shepard Wiley, Jr., Dept. 50, (213) 974-5673

REQUEST FOR IMMEDIATE STAY

This case arises out of a clearly erroneous order of the Superior Court mandating the disclosure of the confidential personnel records of dozens of non-party Burbank police officers, without the statutorily-required notice to or identification of those officers [*Evidence Code* § 1043], or the statutorily-mandated *in camera* review by the court [*Evidence Code* § 1045]. Given the significant statutory violations and the substantial invasion of privacy rights that will occur without the immediate intervention of this Court, petitioner the City of Burbank seeks an Immediate Stay of the July 12, 2010 Order of Los Angeles County Superior Court, Hon. John Shepard Wiley Jr., compelling the City to produce confidential police personnel records directly to the plaintiff, William Taylor, **without the *in camera* review mandated by the *Evidence Code***. The Court ordered this production to take place within 30 days of the date of its order, *i.e.*, by August 11, 2010.

Writ review is appropriate where relief is sought from a discovery order which "may undermine a privilege or right of privacy." *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1018-19. *See also, People ex rel. Lockyer v. Superior Court,* (2004), 122 Cal.App.4th 1060, 1071 (discovery ruling ordering the production of privileged material is reviewable by writ because "there is no way to undo the harm which consists in the very disclosure.") The privacy rights of peace officers in their personnel files are substantial, and the order issued by the Superior Court is an extensive invasion of the privacy rights of dozens of non-party officers who have no involvement in this case. *Warrick v. Superior Court* (2005) 35 Cal. 4th 1011, 1019. The requested Immediate Stay is necessary since the Court has ordered that the confidential personnel records be produced by August 11, 2010, which will likely be before this Honorable Court will have the opportunity to review the merits of this petition. *Kernes v. Superior Court* (2000) 77 Cal.App.4th 525,

531 (immediate stay request is appropriate where discovery of privileged information has been granted). The privilege will be irreparably breached by the production of these confidential records to the plaintiff, and the involved police officers' rights to privacy irreversibly violated, if no stay is granted pending review of this Petition for Writ of Mandate.

INTRODUCTION/QUESTIONS PRESENTED

May a trial court completely skip the *in camera* hearing **mandated** by *Evidence Code* § 1045(b) and order the disclosure of statutorily-protected personnel records of dozens of third-party police officers that it never reviewed? May a trial court grant a *Pitchess* motion and order disclosure of dozens of third-party police officer personnel records when the moving papers never identified those officers as required by *Evidence Code* § 1043, never expressly requested their records, and never provided any justification for the relevance of their personnel records in this action? May a trial court order disclosure of confidential personnel records of third-party police officers where such officers were not notified of the request as required by *Evidence Code* § 1043? May a trial court order disclosure of confidential personnel records of third party police officers based upon alleged facts which were never set forth in an affidavit as required by *Evidence Code* § 1043? Petitioner City of Burbank respectfully submits that the answer to each of these questions is plainly "No."

By means of this Petition for Writ of Mandate, Prohibition or Other Appropriate Relief ("Petition"), the City of Burbank (the "City") seeks review of the July 12, 2010 order granting a *Pitchess* motion issued by the Hon. John Shepard Wiley, Jr. (the "Respondent Court"). The order was a clear abuse of discretion as it violated at least four separate requirements of the exclusive statutory means for compelling confidential police personnel records and

purported to find materiality to the allegations in the case where none had been shown by the moving party. Moreover, in declining to fulfill its statutory obligation to conduct an *in camera* review of the records before ordering them disclosed to the plaintiff, the trial court abdicated its responsibility to protect the confidentiality and privacy rights of the City and the officers whose records were ordered produced.

Absent action by this Court, the City and dozens of police officers with no demonstrated connection to this case will have their confidentiality and privacy rights violated by the trial court's order without any means of redress.[1] Writ relief is appropriate and necessary because the harm resulting from this violation is irreparable and cannot be corrected by a post-judgment appeal. This petition further presents the opportunity to lay down clear guidelines to courts in civil police employment cases for the handling and relevancy requirements of *Pitchess* motions, and the sanctity of the statutory requirements for bringing and granting such motions. Moreover, this petition presents the Court with the novel opportunity to clarify what constitutes sufficient "identification" of police officers in the notice of a *Pitchess* motion to comply with *Evidence Code* § 1043.

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[1] While this Petition often references the privacy rights of the involved officers, the law is clear that the City has an equal right to assert the right to privacy and confidentiality in the records of its police officers. *City and County of San Francisco v. Superior Court* (1993) 21 Cal.App.4th 1031, 1035.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

1. This Petition seeks a writ directing the Respondent Court to vacate and set aside its order of July 12, 2010 granting Real Party's *Pitchess* Motion because: 1) the Court ordered the production of confidential police personnel records without reviewing any of them *in camera* as required by *Evidence Code* § 1045(b); 2) the affected third-party police officers had not been notified of the Motion as required by *Evidence Code* § 1043; 3) no third-party police officers were identified in the moving papers as required by *Evidence Code* § 1043(b)(1), nor was there any argument or showing of good cause for disclosing their personnel records in those papers; 4) the Court relied upon facts which were not supported by affidavit or other evidence as required by *Evidence Code* § 1043(b)(3); 5) the Court improperly relied upon facts and legal theories asserted for the first time in Real Party's Reply Brief; and 6) most of the confidential police personnel records ordered disclosed are not material to the action and no argument supporting their materiality appeared in Real Party's moving papers.

Authenticity of Exhibits

2. All exhibits in the Appendix of Exhibits accompanying this Petition are true and correct copies of original documents on file with the Respondent Court, except Exhibit I, which is a true and correct copy of the original reporter's transcript of the hearing of July 12, 2010 on Real Party's Motion for Discovery of Peace Officer Personnel Records Regarding William Taylor and Motion to Compel Further Responses to Interrogatories and Requests for Production of Documents. The exhibits are incorporated herein by reference as though fully set forth in the Petition. The exhibits are tabbed

as Exs. A-J, and paginated consecutively from page 1 through page 260.

Beneficial Interest of Petitioner/Capacities of Respondent and Real Party In Interest

3. The City is the defendant in an action now pending in the Respondent Superior Court of the State of California for the County of Los Angeles, entitled *William Taylor v. City of Burbank*, LASC No. BC 422252. The City opposed the *Pitchess* Motion at issue herein, which resulted in an order granting disclosure of the confidential personnel records of dozens of current and former Burbank Police Officers. The Legislature gave employing police agencies, as well as individual officers, the right to refuse to disclose confidential police officer personnel records. *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189. Plaintiff William Taylor ("Taylor") is named herein as the real party in interest and was the moving party on the *Pitchess* Motion at issue in this Petition.

Chronology of Pertinent Events

A. The Allegations in the Lawsuit

4. The instant lawsuit for wrongful demotion was filed by Taylor in September, 2009. Taylor's Complaint contends that he was demoted from the position of Deputy Chief to the position of Captain in May of 2009 by then-Chief of Police Tim Stehr in retaliation for his reports of alleged race discrimination and sexual harassment at the Burbank Police Department ("BPD").[2] [Ex. A.][3]

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[2] Deputy Chief is not a ranked position in Burbank and the City disputes that the removal of the Deputy Chief title constituted a demotion, however, that is not relevant to this Petition.

[3] References to the Exhibits In Support of City of Burbank's Petition for Writ of Mandate, Prohibition or Other Appropriate Relief shall be to the exhibit tab and, where applicable, page and line number as [Ex. __, p. __:__.]

B. The Internal Affairs Investigations

5. In 2008, the BPD had conducted an internal investigation of alleged misconduct (use of force) during a criminal investigation of a robbery at the Portos Bakery under investigation No. IA 4-26-08-1 (the "2008 IA Investigation"), but the evidence uncovered during that investigation did not substantiate the misconduct claims. [Ex. C, p. 172:10-15.]

6. In 2009, however, significant new information about purported misconduct during the Portos robbery investigation was brought to the attention of the BPD. That new information generated over thirty investigations into more than twenty BPD officers (the "2009 IA Investigations"), all of which were assigned a sub-number under master investigation No. IA 4-16-09-1. [Ex. C, pp. 172:16-24, 173:2-20.] The 2009 IA Investigations primarily concerned allegations of use of force or failing to report the use of force. One of these investigations involved Taylor, who was accused of different misconduct, to wit, interference in the 2008 IA Investigation to protect one officer who allegedly used force. [Ex. C, p. 172:16-27.] The dozens of other investigations did not involve Taylor and contained a substantial amount of information in confidential personnel records that were not part of, or utilized in, the investigation of Taylor. [Ex. C, p. 173:12-20.][4]

C. Discovery Requests and Responses

7. On November 11, 2009, Taylor served written discovery upon the City, including interrogatories and requests for production of documents. [Ex. C, p.174:7-9.] In responding to interrogatories asking why Taylor was "demoted," the City explained that part of the reason Taylor was reassigned to

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[4] As indicated in Taylor's Reply Brief, the officer on whose behalf Taylor intervened was Omar Rodriguez, who was only one of the numerous officers under investigation in the 2009 IA Investigations. [Ex. D, p. 191:5-18; Ex. C, p. 173:12-20.] Since Rodriguez was not discussed in the original *Pitchess* Motion, the City was not given an opportunity to explain why good cause might be lacking even as to his records.

a different Captain's position (one that was not in charge of Internal Affairs) was due to information that Taylor may have interfered in the 2008 IA Investigation. [Ex. B, p. 87: 4-10.] Importantly, the City never indicated that Taylor's re-assignment was caused by the internal investigation of this allegation, which did not occur until after the re-assignment. [Ex. B, pp. 27:19-24, 28:4-7, 53.] In response to requests to identify every document which "refers or relates in any way" to the demotion [Ex. B, p. 87:27-28], the City identified and provided numerous responsive documents not subject to confidentiality. [Ex. B, p. 88:9-13.] The City also indicated that the information that Taylor had interfered in an investigation was a subject of a pending investigation of him. The City stated that it would provide documents from that investigation when it was complete if they were relevant and discoverable. [Ex. B, p. 88:13-15.] Taylor took issue with this and demanded immediate access to the investigation concerning him. [See Ex. B, pp. 29:25-30:12, 146-147.]

D. The *Pitchess* Motion

8. On March 5, 2010, Taylor filed and served a motion titled "Motion for Disclosure of Peace Officer Personnel and Other Records *Regarding William Taylor* and to Compel Further Responses to Interrogatories and Request for Production," seeking the immediate production of Taylor's personnel records (the "*Pitchess* Motion"). [Ex. B (emphasis added).] The hearing on the *Pitchess* Motion was noticed for April 22, 2010.

9. The *Pitchess* Motion's title expressly referred only to Taylor's personnel records. Numerous statements in the *Pitchess* Motion made clear that Taylor was only seeking his own personnel records. [See e.g. Ex. B, pp. 19:15-18 (title); 33:5-8, 35:2-5, 37:4-5 ("the allegations made *against plaintiff* are relevant and material")(emphasis added).] The showing of good cause in the Motion was that the investigation of Taylor was relevant to demonstrate that his demotion was a pretext for his complaints of harassment and discrimination, and that it was unfair for the City to have access to the

investigation and the ability to use it in the litigation when Taylor could not. [See Ex. B, pp. 30:1-12, 32:6-15.]

10. Nevertheless, one brief item in the Notice of Motion sought the production of records generated in Investigation No. 4-16-09-1. [Ex. B, p. 20:22-23.] As noted above, this was the master investigation number for all of the 2009 IA Investigations of dozens of different officers, not just the investigation of Taylor. [Ex. C, p. 172:16-24.] However, the *Pitchess* Motion did not identify or even discuss any third-party officers whose records it purportedly sought, nor did it attempt to show good cause or relevance to justify the disclosure of the confidential personnel records of any officer other than Taylor.

E. <u>The Completion of the 2009 IA Investigations</u>

11. In March of 2010, after the *Pitchess* Motion was filed, the internal investigation of Taylor was completed and Taylor was provided with notice of its results and new Police Chief Scott LaChasse's intention to terminate him based on those results. [See Ex. C, p. 173:1-11.] As part of the administrative (disciplinary) process, the Burbank Police Department provided Taylor with the documentation supporting that proposed action, including the 23-page report of the investigation of him, 101 pages of witness interview summaries as a part thereof, as well as the underlying 2008 IA Investigation, and a CD recording of all of the interviews conducted in the 2008 IA Investigation and of the interviews pertaining to Taylor in the 2009 IA Investigations. [Id.; Ex. C, pp. 173:1-11, 186-187.] In light of the fact that the documents referenced in the City's discovery responses had been disclosed, the City wrote Taylor's counsel noting that the *Pitchess* Motion was moot. However, Taylor declined to take the Motion off calendar. [Ex. C, pp. 175:2-8, 184.]

F. <u>The Opposition and the Reply Brief</u>

12. On April 8, 2010, the City filed its Opposition to the *Pitchess* Motion. [Ex. C.] Among other things, the City noted that the records as to the

investigation of Taylor (including the 2008 IA Investigation that Taylor was alleged to have influenced) had already been provided as part of the administrative process. [Ex. C, pp. 8:12- 10:27.] The City also affirmatively and candidly pointed out that Taylor had made passing reference to the master file number for the 2009 IA Investigations in the Motion, which it believed to be inadvertent. [Ex. C, pp. 8:12- 10:27.] As a result, the City did not give notice of the *Pitchess* Motion to any third party officers. [Ex. C, p. 168:22-24; see also Ex. I, p. 248:7-16.] The City further noted that, because the BPD had initiated termination proceedings in the weeks after Taylor filed the *Pitchess* Motion, Taylor might improperly try to present new facts and arguments for the first time in his Reply Brief, instead of filing a new motion based thereon. [Ex. C, pp. 167:28 (fn. 6) and 168:28.]

13. As feared by the City, Taylor's Reply Brief [Ex. D] was rife with new factual assertions, which were not supported by an accompanying affidavit and relied upon facts that had occurred *after* Taylor filed the *Pitchess* Motion. Specifically, whereas the Motion had focused on Taylor's May 2009 "demotion" by then-Chief of Police Stehr, the Reply focused on Taylor's March 2010 proposed termination by current Chief of Police LaChasse, and argued that the termination was an elaborate conspiracy orchestrated by Richard Kreisler (a lawyer at Liebert, Cassidy, Whitmore) and involving, among others, Jerry Gardiner, the retired police chief who investigated Taylor, and the independent panel who reviewed the investigation, comprised of Kriesler, Merrick Bobb and Debra Wong Yang. [Ex. D, pp. 190:17- 191:13, 195;11-19.] The Reply Brief also presented, for the first time, arguments in support of disclosure of confidential personnel files of third party officers, and named, again for the first time, one third-party officer, Omar Rodriguez. [Ex. D, p. 191:5-16, 193:20-24.]

14. The City filed a Motion to Strike Taylor's Reply Brief on the grounds that it raised new arguments and facts which post-dated and were not set forth in the original *Pitchess* Motion, that it did not provide evidentiary

support for the new factual assertions, and that the issues raised therein were irrelevant to the original *Pitchess* Motion. [Ex. G.]

G. The Hearing on the *Pitchess* Motion

15. The hearing on the *Pitchess* Motion was continued on the Respondent Court's own motion several times [Exs. E, F, H.], and was ultimately heard on July 12, 2010. [Exs. I, J.]

16. The Court indicated at the beginning of argument that it was granting the Motion in its entirety as to every officer who was a subject of the 2009 IA Investigations, based in significant part on Taylor's arguments in the Reply Brief about his termination.[5] [Ex. I, pp. 226:27- 227:1, 231:7-20, 232:21-26.] Citing only to the reference to the master investigation number, the Respondent Court held that each of these individual officers was sufficiently identified in the Motion. [Ex. I, pp. 243:23- 244:2.] The Court also acknowledged that the individual officers had not been named in or given notice of the Motion, but declined to continue the hearing so that proper notice could be given. [Ex. I, pp. 248:7- 250:8.] The Court further rejected counsel's arguments that good cause had not been shown for the production of dozens of unrelated investigations, pursuant to *Evidence Code* § 1047 (*see Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400), apparently mistaking this argument for an undue burden objection. [Ex. I, pp. 250:11- 251:3.] In addition, the Court found that *all of* the 2009 IA Investigations were material by averring – incorrectly - that the City's discovery responses stated that the City relied upon "the investigation" *of Taylor* in re-assigning Taylor. [Ex. I, pp. 246:18-27.]

21. Counsel thereafter argued that the Court should take a longer look at the claimed relevance during the statutorily required *in camera* review. [Ex. I, pp. 251:16- 252:16.] However, in a startling departure from the clear statutory law, the Respondent Court ordered the documents produced <u>without</u>

[5] The Court heard at the same time both the *Pitchess* Motion and a separate motion by the City for discovery sanctions, which is not at issue here.

the required *in camera* review, as follows:

MS. PELLETIER: Your honor, I am just unclear on the Pitchess motion. You are ordering the *in camera* hearing and do we want to set a date for it?

THE COURT: The Motion set out the documents it sought and they are ordered produced.

MS. PELLETIER: Because the statute requires if you grant the motion, it requires an *in camera* review.

THE COURT: I have ruled. [Ex. I, p. 257:20-27.]

22. The Court granted the *Pitchess* Motion "in its entirety" without conducting the statutorily mandated *in camera* review. [Ex. I, p. 255:7-8; Ex. J.]

Basis for Relief

23. The issue presented in this Petition is whether the Respondent Court's July 12, 2010 order must be reversed because it violated the privacy rights that third-party police officers have in their personnel records, violated the right to confidentiality that the City has in such records, violated the due process rights of the City and those officers in relying on extensive new arguments and unsupported facts introduced for the first time in Taylor's Reply Brief, and violated the mandatory statutory requirements for ordering disclosure of confidential police officer personnel records. Specifically, writ relief is appropriate because: 1) there is no dispute that the third-party officers were never notified of the *Pitchess* Motion as required by *Evidence Code* § 1043; 2) the Motion never named or described the officers and provided no argument for disclosure of their records, as also required by *Evidence Code* § 1043; 3) the Respondent Court ordered disclosure of confidential police officer personnel records without holding the *in camera* hearing mandated by *Evidence Code* § 1045; 4) the Court granted the Motion in reliance upon alleged facts that were not supported by an affidavit in violation of *Evidence Code* § 1043; 5) Taylor did not make a sufficient showing of materiality of the

third party officers' records to justify disclosure; and 6) in his Reply Brief, Taylor improperly submitted for the first time, and the Court relied upon, new, but unsupported, factual allegations and legal theories to which the City was not given the opportunity to respond.

Absence of Other Remedies

24. The instant order granting the *Pitchess* Motion is not appealable. *Code of Civil Procedure* § 904.1. Writ review is appropriate when the petitioner seeks relief from a discovery order which may undermine a right of privacy, such as an order to disclose confidential police personnel records, because post-judgment appellate remedies are not adequate to redress the erroneous disclosure of private information. *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1018 (granting writ review of order granting a *Pitchess* motion); *see also Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 49 (writ review proper for denial of a *Pitchess* Motion). Moreover, writ review of orders on *Pitchess* motions is appropriate because the confidentiality provisions of *Penal Code* § 832.7 and the procedures for obtaining disclosure of such records under *Evidence Code* §§ 1043, 1045 are the "only protections available" to officers to safeguard the privacy of their records, because a violation of § 832.7 is not actionable for damages. *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 614 (*citing Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 427-428). There will be no other recourse for the affected officers following the ordered disclosure of their confidential records. If this Court does not act on this Petition, the confidential information of dozens of police officers will be improperly disclosed to Real Party plaintiff, and be used for whatever purposes he deems fit during the pendency of the litigation and, ultimately, trial.

25. Writ review is also appropriate for issues of first impression that

are of general importance to the trial courts and to the legal profession, and where general guidelines can be laid down for future cases. *California Highway Patrol, supra,* 84 Cal.App.4th at 1018; *People v. Superior Court* (2000) 78 Cal.App.4th 403, 413. Here, it appears that this Court needs to provide guidance to the trial court, especially on issues concerning the identification of and notice to the officers whose records were sought, the standards for the statutorily-required showing of good cause/materiality, and the necessity of holding an *in camera* hearing and conducting the review required by *Evidence Code* § 1045 upon granting a *Pitchess* motion. In addition, the issue of what constitutes sufficient identification of an officer for compliance with *Evidence Code* § 1043(b)(1) is not clearly resolved by the case law, and is an area where the lower courts could use guidance.

PRAYER

Petitioner City of Burbank prays that this Court:

1. Issue an alternative writ directing the Respondent Court to set aside and vacate its order of July 12, 2010 granting Taylor's *Pitchess* Motion, and to either deny the Motion in its entirety, or to rehear the Motion after the third party officers have been given notice and an opportunity to appear, and after the City has been given a chance to respond to the new factual assertions and arguments raised for the first time in the Reply Brief, and also directing the Respondent Court that it must comply with the statutory mandates of the *Evidence Code* and, should it grant the *Pitchess* Motion, it must review any and all materials that are subject to production in an *in camera* hearing pursuant to *Evidence Code* § 1045; or alternatively directing the court to show cause why such relief should not be granted; and, upon return of the alternative writ, issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted; and

2. Award petitioner its costs pursuant to Rule 8.493(a) of the *California Rules of Court*; and

3. Grant such other relief as may be just and proper.

Dated: July 23, 2010

Burke, Williams, & Sorensen, LLP

By: _____
Kristin A. Pelletier
Attorneys for Petitioner City of Burbank

VERIFICATION

I, Kristin A. Pelletier, declare as follows:

I am an attorney at law duly admitted to practice in the State of California and a partner in the firm of Burke, Williams & Sorensen, LLP, counsel of record for Petitioner in this action.

I verify this Petition because I am the person most familiar with the records and proceedings in the case, because I am the partner at my firm with responsibility for the defense of this action, and because I am a custodian of my firms files for this matter. I have read the allegations of the Petition and know their contents. The exhibits attached to the petition are true and accurate copies of the pleadings and papers in this action. As to other matters described in the Petition, the statements of the parties contentions and the trial court's rulings are based on the statements made in the parties briefing and in the trial court's order, all of which I have reviewed. The material provisions of the briefing and order are all part of the official court record of this action in the trial court. I have personal knowledge of the remaining allegations of the Petition or they are statements of my opinion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed at Los Angeles, California on July 23, 2009.

Kristin A. Pelletier

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 12, 2010, the Respondent Court, Judge John Shepard Wiley Jr., ordered the City of Burbank (the "City") to produce over 30 separate internal Burbank Police Department ("BPD") investigations to the plaintiff in this action, Real Party in Interest William Taylor ("Taylor"). The Court's order is in clear violation of the statutes protecting police personnel records and establishing a procedure for the production of those records, and is highly prejudicial to, and invades the privacy rights of, not only the City, but numerous current and former Burbank officers who are not parties to this action and were not given an opportunity to be heard prior to the Court's action. The Respondent Court abused its discretion by committing clear error in numerous significant respects, and the only possible way to redress the abuse is to grant the City's Petition.

First, the Respondent Court violated *Evidence Code* § 1043 when it held a hearing on Taylor's *Pitchess* Motion[6], despite the fact that the notice provisions of *Evidence Code* § 1043 had not been met;

Second, the Respondent Court violated *Evidence Code* §§ 1043 and 1047 when it granted the *Pitchess* Motion as to dozens of third-party officers who were not identified in the moving papers, which also contained no argument for disclosure of personnel records of such officers;

Third, the Respondent Court violated *Evidence Code* § 1043, when it granted the *Pitchess* Motion over the City's objection based upon facts which were not included in an affidavit as required and which were set forth for the first time in Taylor's Reply Brief; and

Fourth, the Respondent Court violated *Evidence Code* § 1045 when it granted the Pitchess motion but refused to review the confidential police

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[6] A *Pitchess* Motion is a motion for police personnel records under *Pitchess v. Superior* Court (1975) 11 Cal.3d 531, 538 and *Evidence Code* § 1043.

officer personnel records involved in an *in camera* proceeding, and instead simply ordered the City to produce several dozen investigations directly to Taylor.

In short, the Respondent Court disregarded clear statutory mandates and the privacy/confidentiality rights of the City and numerous third-party Burbank officers in ordering production of the confidential personnel records at issue. The only way to remedy this clear error and protect the City and these officers is to issue a writ compelling the Respondent Court to vacate its order of July 12, 2010, and to comply with the applicable statutes and case law.

II. STATEMENT OF FACTS

The relevant facts are set forth in paragraphs 4 through 22 of the Petition and are incorporated herein by this reference.

III. STANDARD OF REVIEW

The Respondent Court's discretionary decisions on materiality are reviewed for abuse of discretion. *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 49. A trial court will be held to have abused its discretion where it ordered disclosure, but the moving party did not satisfy the statutory requirements for discovery of peace officer personnel records. *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019; *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 (failure to apply established law to the facts is an abuse of discretion). Even in the context of reviewing decisions on *Pitchess* motions, however, the interpretation of a legal principle or statute is a question of law which is reviewed *de novo*. *Fletcher, supra*, 100 Cal.App.4th at 390-391.

IV. THE LEGISLATURE HAS MADE POLICE OFFICER PERSONNEL RECORDS CONFIDENTIAL AND SUCH RECORDS ARE NOT DISCOVERABLE UNLESS THE PROCEDURES IN THE *EVIDENCE CODE* ARE FOLLOWED

In 1978 the California Legislature codified the privileges and procedures surrounding what had become known as "*Pitchess* motions" through the enactment of *Penal Code* §§ 832.7 and 832.8 and *Evidence Code* §§ 1043 through 1045. *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82. The *Penal Code* sections define police personnel records and provide that they are confidential, subject to discovery only pursuant to the procedures set forth in the *Evidence Code*. *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 49. "In enacting [*Evidence Code*] sections 1043 and 1045, the Legislature clearly intended to place specific limitations and procedural safeguards on the disclosure of peace officer personnel files which had not previously been found in judicial decisions." *California Highway Patrol v. Superior Court*, 84 Cal.App.4th 1010, 1019 (2000).

Accordingly, today, compliance with *Evidence Code* §§ 1043-1047 is the exclusive method for obtaining both police officer personnel records and the information contained therein. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, fn. 2. Because police personnel records are confidential, their disclosure requires strict adherence to the motion and hearing requirements of the *Evidence Code*. *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426. As relevant here, these requirements include identification of and notice to the affected officer(s) and an affidavit showing a specific factual scenario establishing the materiality of the confidential information to the case at hand. *Evidence Code* § 1043; *California Highway Patrol, supra,* 84 Cal.App.4th at 1019-1020. If these requirements are met and the court determines that the motion sets forth good cause for production of the requested information, the court must then conduct an *in camera* review to determine relevance and materiality before any documents are produced.

Evidence Code § 1045(b); *Abatti v. Superior Court, supra*, 112 Cal.App.4th at 50.

V. ORDERING DISCLOSURE WITHOUT THE *IN CAMERA* HEARING REQUIRED BY *EVIDENCE CODE* § 1045 IS A CLEAR ABUSE OF DISCRETION

Despite the presence of error at virtually every step of the *Pitchess* procedure, it is the complete omission of the mandatory *in camera* review that is the Respondent Court's most glaring abuse of discretion. As noted above, the second step in the *Pitchess* procedure (after a determination of materiality/good cause) is supposed to be the *in camera* examination of the "potentially relevant" records for the court to determine whether they, in fact, have any relevance to the issues presented in the current proceedings. *Abatti v. Superior Court, supra*, 112 Cal.App.4th at 50 (*citing City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1143).

Evidence Code § 1045(b) mandates that this *in camera* review "shall" be conducted. *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70-71 (trial court "must" review the records in camera); *People v. Samuels* (2006) 36 Cal.4th 96, 116 (court "is required" to conduct an *in camera* review). That provision sets forth both specifically-enumerated categories of information that must be excluded from disclosure[7] during the *in camera* review, as well as the general criteria to guide the court's determination of relevance for disclosure, while also insuring that the privacy interests of the subject officers are protected. *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81; *Abatti, supra*, 112 Cal.App.4th at 50.

The statutory scheme recognizes "that the officer in question has a strong privacy interest in his or her personnel records and that such records

---

[7] Among other things, *Evidence Code* § 1045(b) requires exclusion of facts which are so remote as to make their disclosure of little practical benefit. *Evidence Code* § 1045(c) further provides that where the information sought consists of the policies or pattern of conduct of an employer, the court must consider whether this information is available from other sources.

should not be disclosed unnecessarily." *People v. Mooc* (2001) 26 Cal.4th 1216, 1227. Accordingly:

> Both *Pitchess* and the [*Evidence Code*] *require* the intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed to the [moving party] only those records that are found both relevant and otherwise in compliance with statutory limitations. In this manner, the Legislature has attempted to protect [the moving party]'s right to a fair trial and the officer's interest in privacy to the fullest extent possible."

Id. (emphasis added).

The requirement to hold the *in camera* proceeding is so clear that the City has been unable to locate a published case where a trial court ordered disclosure without conducting one. Nor should the *in camera* review be treated as a *pro forma* exercise. The California Supreme Court has in fact warned that trial courts should make a record of the confidential documents that were actually examined, so that decisions regarding exclusion of such records can be intelligently reviewed. *See e.g., People v. Mooc, supra,* 26 Cal.4th at 1229.

Despite unequivocal legal precedent, the Respondent Court completely skipped this second, mandatory step of the process for seeking disclosure of confidential police personnel records, as follows:

> MS. PELLETIER: Your honor, I am just unclear on the *Pitchess* motion. You are ordering the *in camera* hearing and do we want to set a date for it?
>
> THE COURT: The Motion set out the documents it sought and they are ordered produced.
>
> MS. PELLETIER: Because the statute requires if you grant the motion, it requires an *in camera* review.
>
> THE COURT: I have ruled. [Ex. I, p. 257:20-27 (p. 34)]

Thus, in ordering the documents to be produced, the Respondent Court simply declined to hold the *in camera* hearing required by *Evidence Code* § 1045(b). The Court did not review a single page of the police officer

personnel records that it has ordered produced to Taylor, and in so doing has upset the legal balance struck by the Legislature. As such, the Respondent Court has not made the necessary findings mandated by *Evidence Code* § 1045(b), and its order granting disclosure of confidential police personnel records without such a review and hearing was a clear abuse of discretion.

Accordingly, at a minimum, this Court should issue a writ directing the Respondent Court to vacate its order of July 12, 2010, and hold the required *in camera* hearing before ordering disclosure of any confidential police personnel records, and to follow the applicable law as to what records are and are not discoverable when it does so.

VI. THE *PITCHESS* MOTION FAILED TO IDENTIFY ANY THIRD PARTY OFFICER WHOSE RECORDS WERE SOUGHT BECAUSE TAYLOR WAS ONLY REQUESTING HIS OWN PERSONNEL RECORDS

Taylor's *Pitchess* Motion was required to identify, among other things, "the peace or custodial officer whose records are sought." *Evid. Code* § 1043(b)(1). Such a motion must include "the *name* of the peace officer whose records are being sought." *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 889 (emphasis added), *disapproved on other grounds in Int'l Fed. of Professional and Technical Engineers v. Superior Court* (2007) 42 Cal.App.4th 319, 344-345.[8] Absent such identification, the responding agency cannot comply with its obligation to notify "the individual" officer whose records are sought. *See Evid. Code* § 1043(a).

Taylor's *Pitchess* Motion plainly failed to *identify*, by name or otherwise, any officer (other than himself) whose records were sought. Although the Respondent Court would ultimately order disclosure of dozens of unrelated investigations involving more than 20 third-party officers, the *Pitchess* Motion did not mention any other officer and made clear that Taylor

[8] If there are confidentiality concerns, the motion can be filed under seal. *Garcia v. Superior Court* (2007), 42 Cal.App.4th 63.

was only asking for discovery of *his own* personnel records:

- The title of the Pitchess Motion states in relevant part "Motion for Disclosure of Peace Officer Personnel and Other Records *Regarding William Taylor*..." [Ex. B, p. 19:15-18 (emphasis added).]
- Taylor stated he only sought information "in regard to the defendant's alleged reason for the adverse employment actions taken *against plaintiff*." [Ex. B, p. 33:5-8 (emphasis added).]
- Similarly, Taylor argued that "the Court should order the production of all relevant reports, investigative materials, interviews, transcripts, and other data regarding the investigation and disposition of any complaints of misconduct *allegedly involving plaintiff*." [Ex. B, p. 35:2-5 (emphasis added).]
- The Motion states that "the records pertaining to the investigations by defendant of *the allegations made against plaintiff* are relevant and material." [Ex. B, p. 37:4-5 (emphasis added).]

Moreover, the Motion's justification/showing of good cause for discovery of the investigation of Taylor was that the City had referred to it in its interrogatory responses, and it was inequitable for the City to have access to the materials supporting its affirmative defenses and denials in the case, but to preclude Taylor from access to the same materials. The Motion further stated that Taylor's need for the information outweighed any confidentiality interests of the City because it was necessary to rebut the City's claims of misconduct *by him*. [Ex. B, pp. 29:25-30:12, 32:6-19, 40:25-41:9.]

In short, the *Pitchess* Motion never identified either by name, description, or implication (such as by explaining what personnel records were sought and why they were relevant) any third-party officer(s) whose records were being sought. The Respondent Court nonetheless found that the Motion's brief, isolated citation to Case No. IA 4-16-09-1, which happened to

be the master case number for all of the 2009 IA Investigations, provided the requisite statutory "identification." This construction is unsupported by the plain meaning of the statute and the case law, which has interpreted "identify" to mean "name." *City of Los Angeles v. Superior Court*, *supra*, 111 Cal.App.4th at 889.[9] The City submits that the mere citation to a master number that applies to numerous investigations of dozens of officers cannot constitute the requisite statutory identification in a case such as the present where: (1) Taylor did not indicate whose or even what types of investigations he sought; (2) Taylor's Motion indicated he was only seeking his own records (to challenge the basis for *his* "demotion"), and did not include any argument on the materiality of the personnel records/investigations of any officers other than him; and (3) the uncontroverted evidence before the Respondent Court established that the master number applied to numerous internal investigations that had nothing to do with the misconduct allegations against Taylor. [Ex. C, p. 174:12-20.] In holding to the contrary, the Respondent Court abused its discretion. Accordingly, this Court should issue a peremptory writ directing the Respondent Court to vacate its order of July 12, 2010, and provide guidance to the Respondent Court and the parties as to the *Evidence Code's* identification requirement.

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[9] Neither Taylor nor the Respondent Court cited any case where an officer whose records were sought was not named, much less any case suggesting that a passing reference to a file number satisfies the identification requirement of *Evidence Code* § 1043. In his Reply Brief, Taylor did cite to several cases where the moving party on a *Pitchess* Motion lacked certain details about the incident giving rise to the Motion. However, in none of those cases did the moving party fail to name the officer(s) whose records were sought, and Taylor failed to point to any case law where such an omission occurred or was excused. [See Ex. G, p. 216:26-28, fn. 2.]

VII. IT WAS AN ABUSE OF DISCRETION TO HOLD A HEARING ON THE *PITCHESS* MOTION WITHOUT THE REQUIRED STATUTORY NOTICE TO THE THIRD PARTY OFFICERS WHOSE PRIVACY RIGHTS WERE IMPLICATED

As a result of the *Pitchess* Motion's failure to name or otherwise identify any third-party officers, or to articulate that it sought the records of any third-party officers, there was no dispute below that those officers were not given notice of that Motion. It was therefore an abuse of discretion for the Respondent Court to proceed with the hearing and order disclosure of the confidential personnel records of those officers.

Police officers whose records are sought are required to be given notice by the public agency served with the *Pitchess* Motion. *Evidence Code* § 1043(a). Because police personnel records are confidential, their disclosure requires strict adherence to the proper procedures. *Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th 419, 426. *Evidence Code* § 1043(c) further mandates that "*No hearing* upon a motion for discovery or disclosure shall be held *without full compliance with the notice provisions* of this section..." Therefore, as a matter of law, absent notice by the agency to the officer whose records are sought, no hearing may be held on the motion. *City and County of San Francisco v. Superior Court* (1993) 21 Cal.App.4th 1031, 1034.

The importance of notice is particularly evident where, as here, the motion itself utterly fails to establish good cause for the sought-after discovery. *Id.*, at 1035. The Legislature was careful to give both the officer *and* the police agency the right to refuse to disclose any personnel information, including complaints or investigations concerning the officer, in both civil and criminal proceedings. *City and County of San Francisco, supra,* 21 Cal.App.4th at 1035. The third-party officers' rights would be nullified if a hearing on the question of disclosure could be held absent proper notice to them. *Id.*; *see also Abatti, supra,* 112 Cal.App.4th 39, 56-57. Thus, even

where it is entirely the public agency's fault in failing to notify an officer who was expressly named in a *Pitchess* Motion (which did not happen here), it is error for a trial court to proceed to hear the Motion as to that officer until he or she has been given notice and an opportunity to respond. *City and County of San Francisco, supra,* 21 Cal.App.4th [at] 1034-1035; *Abatti, supra,* 112 Cal.App.4th 39, 56-57.

In the present case, it is undisputed that the City did not provide notice to any third-party officers. Unlike in *City and County of San Francisco* and *Abatti, supra,* there was a perfectly good reason for such lack of notice, as no third-party officers were named or identified in the original *Pitchess* Motion, and no attempt was made therein to argue the materiality of their records. In any event, as the cases make clear, regardless of the reason, absent notice to the affected officers, it was an abuse of discretion for the Respondent Court to proceed to hear the *Pitchess* Motion. *City and County of San Francisco, supra,* 21 Cal.App.4th [at] 1034-1035; *Abatti v. Sup. Ct.* (2003) 112 Cal.App.4th 39, 56-57.

Therefore, as a matter of law, this Court should, at a minimum, issue a writ directing the Respondent Court to vacate its order of July 12, 2010 and to issue a new order continuing the hearing on the *Pitchess* Motion until the affected officers have been give notice and an opportunity to be heard.

VIII. THE *PITCHESS* MOTION DID NOT MAKE A SUFFICIENT SHOWING OF MATERIALITY TO JUSTIFY GRANTING THE MOTION

As noted above, information from the personnel file of a police officer is private, personal, and privileged and may only be disclosed pursuant to a motion brought in compliance with the rules and procedures set forth in *Evidence Code* § 1043 *et seq. See Penal Code* § 832.7(a); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-84. Those procedures require that

the moving papers and affidavit establish good cause for the production of police personnel records, "setting forth the materiality thereof to the subject matter involved to the pending litigation." *Evid. Code* § 1043(b)(3). Numerous cases have interpreted the good cause requirement, including *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1147, which held that the party seeking such records must provide a "specific factual scenario" establishing a "plausible factual foundation" justifying production of the records. The California Supreme Court has expressly prohibited "fishing expeditions" in this regard. *City of Santa Cruz, supra,* 49 Cal.3d at 85 (*quoting Pitchess v. Superior Court* (1975) 11 Cal.3d 531, 538).

A. The *Pitchess* Motion Did Not Attempt To Show That The Unrelated Investigations Of Dozens Of Third-Party Officers Were Relevant To Taylor's Case

As discussed above, *infra*, Taylor did not attempt to show materiality regarding the investigations of third-party officers at the time he filed the original *Pitchess* Motion because he was not requesting such records. Rather, the Motion repeatedly indicated that it was seeking the City's investigation *of Taylor* based on the City's discovery responses indicating that there might be additional documents relating to the underlying factual events that led to Taylor's reassignment, which the City would know (and produce if relevant) once that investigation was complete. The proffered good cause for discovery of these records was that it was inequitable for the City to have access to the materials supporting its affirmative defenses and denials in the case, but to deny Taylor access to the same materials, and that Taylor's need for the information outweighed any confidentiality interests of the City because it was necessary to rebut the City's claims of misconduct *by him* that led to his demotion. [Motion, at 4:25-5:12, 7:4-19, 14:25-15:9.] It is true that the Motion also contained a brief citation to the master file number assigned to all of the 2009 IA Investigations, however, it made no argument as to why the

investigation of any officer other than Taylor was relevant in this action.

In short, Taylor's *Pitchess* Motion neither showed, nor attempted to show, any plausible justification for the discovery of personnel records of other Burbank officers, including the investigations of alleged misconduct of those officers contained within master case No. IA 4-16-09-1. The City has made clear both that it produced the investigation of Taylor referenced in its discovery responses, and that this investigation post-dated and was not relied upon in the decision to reassign ("demote") Taylor. [Ex. C, pp. 173:1-11, 186, Ex. I, p. 246:6-23.] These were the two bases upon which Taylor brought the Motion, and neither justifies the production of unrelated records of third-party police officers. Taylor's attempt to expand the Motion and make the showing of relevance necessary for the production of these records in his Reply Brief was not only improper, but still failed to satisfy the good cause requirement.

B. The Respondent Court Impermissibly Relied Upon Unsubstantiated Facts And Arguments Regarding Taylor's Post-Motion Proposed Termination Which Were Presented For the First Time In Taylor's Reply Brief

A party must set forth the facts and law justifying the relief requested in its moving papers, and cannot raise new issues for the first time in a reply brief. *See, In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214. Yet, as discussed above, and notwithstanding his unsupported protests to the contrary, that is exactly what Taylor did here. Similarly, it is improper for a court to rely upon new facts and theories raised for the first time in a reply brief. *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010. Yet, that is what the Respondent Court did here as well.

It is not difficult to grasp the impropriety here, as Taylor's Reply Brief argued, and the Court relied upon, facts that did not even occur until several weeks after Taylor filed the *Pitchess* Motion. The *Pitchess* Motion sought to

obtain the investigation of Taylor to show that the stated reasons for the purported demotion by former Chief Tim Stehr were a pretext. The City's opposition responded to these arguments.

After the City, under new Chief of Police Scott LaChasse, initiated termination proceedings against Taylor, he filed his Reply Brief, in which he tried to re-shape the Motion as a request for broader disclosure. Instead of arguing that the investigation of him would disclose facts that he could use to show his "demotion" was retaliatory, he argued that his termination was the product of a conspiracy orchestrated by various outside attorneys, investigators, and independent reviewers. The Reply Brief claimed, for the first time, that Taylor needed all of the 2009 IA Investigations and dispositions in order to disprove the charges against him. [Ex. D, p. 195:20-24]

Similarly, the Reply Brief attempted to transform the scope of the documents requested by the original *Pitchess* Motion. In the Reply Brief, Taylor argued that:

> Plaintiff is entitled to the production of these entire internal affairs file, including all notes memoranda, statements, audiotapes, videotapes, reports, and any and all other documents regarding these investigations. Plaintiff is also entitled to the production of the complete *dispositions of these investigations as to each and* ***every BPD officer*** who was the subject of either of these investigations, including any and all recommendations made regarding such dispositions...

[Ex. D, p. 195:11-13 (emphasis added).] This stands in stark contrast to the following statement made in the original *Pitchess* Motion:

> Here, similarly, the Court should order the production of all relevant reports, investigative materials, interviews, transcripts and other data regarding the investigation and *disposition of any complaints of misconduct* ***allegedly involving plaintiff***.

[Ex. B, p. 35:2-5 (emphasis added).]

The City filed an objection to the new factual assertions and good cause theories asserted for the first time in the Reply Brief. [Ex. G.] Nevertheless, the Court relied upon these new facts and theories in granting the *Pitchess* Motion, expressly stating it was basing its good cause finding on Taylor's argument that the investigation of him was a sham that led to his termination. [Ex. I, pp. 231:7-16, 232:21-26.]

Not only is the Respondent Court's reliance on these new facts and Taylor's post-Motion proposed termination improper, even they do not establish the materiality of dozens of unrelated confidential police investigations. In fact, Taylor's Reply Brief acknowledged that he was only investigated for interfering with the investigation of a single officer--Lt. Omar Rodriguez--and that it was this interference that led to his termination. [Ex D, p. 191:5-8, 193:27-194:2.] Taylor failed to articulate or make any showing of how the unrelated investigations of the dozens of other third-party officers have any bearing on this issue, and the uncontroverted evidence before the Respondent Court [Ex. C, pp. 173:12-20] established that they did not. Nor can Taylor make the requisite materiality showing for uninvolved officers in light of the provisions of *Evidence Code* § 1047 and the applicable case law. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400 (*Evidence Code* § 1047 applies in civil case and limits disclosure of police personnel records to those officers directly involved in the incident that is the subject of the litigation). The Respondent Court accordingly abused its discretion in granting the *Pitchess* Motion and ordering disclosure of the confidential records of such uninvolved officers. As such, this Court should issue a writ directing the Respondent Court to vacate its July 12, 2010 order, and to issue a new order denying the *Pitchess* motion.

C. The Respondent Court Relied Upon New Facts In The Reply Brief Which Were Not Supported By An Affidavit

Evidence Code § 1043(b)(3) states in relevant part that a *Pitchess* motion "shall" include "(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation..."

In the present case, Taylor did not submit any affidavits or evidence in conjunction with the Reply Brief. Thus, even if it were proper for him to have made his good cause showing in the Reply (which it was not), he provided absolutely no evidence to support that showing. Thus, Taylor did not and could not have satisfied even the "relatively low threshold" for a *Pitchess* motion as to these facts, and it was an abuse of discretion for the Respondent Court to have relied on the unsubstantiated facts and arguments set forth for the first time in Taylor's Reply in granting the *Pitchess* Motion.

XI. CONCLUSION

As shown above, the Respondent Court abused its discretion in issuing its July 12, 2010 order granting the Taylor's *Pitchess* Motion. For all of the foregoing reasons, this Court should issue a writ directing the Respondent Court to vacate that order and enter a new order denying the *Pitchess* Motion. Alternatively, the Court should at a minimum direct the Respondent Court to hold the statutorily-mandated *in camera* proceeding before ordering the disclosure of the personnel records of numerous third party police officers. In addition, the Court should provide guidance to the Respondent Court as to what constitutes good cause for the production of confidential records of third party police officers that have no bearing on Taylor's claims herein.

Dated: July 23, 2010 Burke, Williams, & Sorensen, LLP

By: _____
Kristin A. Pelletier
Attorneys for Petitioner City of Burbank

CERTIFICATE OF WORD COUNT

The text of this petition and supporting memorandum consists of 9,640 words as counted by Microsoft Word Processing program used to generate the brief.

Dated: July 23, 2010

Burke, Williams, & Sorensen, LLP

By: _____
Kristin A. Pelletier
Attorneys for Petitioner City of Burbank

PROOF OF SERVICE PERSONAL DELIVERY

I am employed in the County of Los Angeles, State of California and am over the age of 18 and not a party to the within action. My business address is 1511 W. Beverly Blvd., Los Angeles, CA 90026. On July 23, 2010, I personally served the following document described as:

PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES;

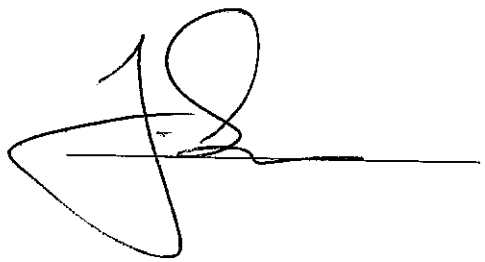
REQUEST FOR IMMEDIATE STAY OF DISCOVERY ORDER REQUIRING DISCLOSURE OF CONFIDENTIAL PEACE OFFICER PERSONNEL RECORDS WITHOUT AN *IN CAMERA* HEARING

by delivering copies thereof to:

The Hon. John Shepard Wiley, Jr.
Los Angeles County Superior Court
Department 50
111 N. Hill Street
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 23, 2010, at Los Angeles, California.



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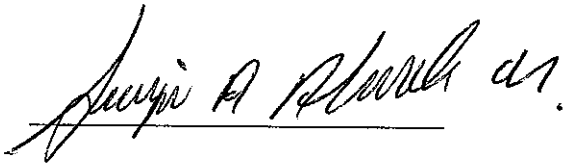
by delivering copies thereof to:

Gregory W. Smith, Esq.
Law Offices of Gregory W. Smith
6300 Canoga Ave., Suite 1590
Woodland Hill, CA 91367
Phone: (818) 712-4000

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 23, 2010, at Los Angeles, California.



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by delivering copies thereof to:

Christopher Brizzolara, Esq.
1528 16th Street
Santa Monica, CA 90404
Phone: (310) 394-6447

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 23, 2010, at Los Angeles, California.